

Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C
Order No. 2006-

In re: Docket No. 2005-404-C

Time Warner Cable Information
Services (South Carolina), LLC,

 Complainant/Petitioner,

vs.

Home Telephone Co., Inc.,

 Defendant/Respondent.

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INSTRUCTIONS**

In re: Docket No. 2005-405-C
Time Warner Cable Information
Services (South Carolina), LLC,
Complainant/ Petitioner,
vs.
PBT Telecom, Inc.,
Defendant/Respondent.

In re: Docket No. 2005-406-C
Time Warner Cable Information
Services (South Carolina), LLC,
Complainant/ Petitioner,
vs.
Ft. Mill Telephone Company,
Defendant/Respondent.

Pursuant to S.C. Code Section 58-9-1200 and 26 S.C. Regs. 103-836(4) Time Warner Cable Information Services (South Carolina), LLC (“TWCIS”) submits this petition seeking reconsideration or rehearing of Order No. 2006-515. The Order contravenes both state and federal law and mischaracterizes the factual record. The Order erroneously indicates that the rural exemption protects the Defendants from interconnection obligations under 47 U.S.C. Section 251(a) & (b) and erroneously holds that there is an issue of fact regarding whether TWCIS is a “telecommunications carrier.” The Order also mischaracterizes the record in regard to the stipulation between TWCIS and the South Carolina Telephone Coalition (“SCTC”). In support of its petition TWCIS would show the following:

1. On September 13, 2006, the Commission issued Order No. 2006-515 in which it denied TWCIS' motion for summary disposition; denied the motion to dismiss of St. Stephen Telephone Co., Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Fort Mill Telephone Co. (collectively "Defendants"); and granted Defendants' motion to hold the matters in abeyance for 120 days from the date of the order or until the FCC rules on TWCIS' pending petition. Counsel was served with Order No. 2006-515 on September 20, 2006.

2. TWCIS submits that its substantial rights have been prejudiced because the findings, inferences, conclusions, and decisions are

- a. in error of law;
- b. violate statutory provisions;
- c. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- d. arbitrary and capricious or characterized by an abuse of discretion.

TWCIS petitions the Commission to rehear and reconsider its Order No. 2006-515 for the following reasons.

**THE ORDER ERRONEOUSLY HOLDS
THAT RURAL CARRIERS ARE EXEMPT FROM THE
OBLIGATIONS OF 47 U.S.C. § 251(a) & (b)**

3. The Order is in error of law in that it holds that rural carriers are exempt from the obligations of 47 U.S.C. Section 251(a) and (b) if the rural exemption applies. The Commission's order indicates

As an opening matter, Sections 251(a), (b), and (c) each impose interconnection duties upon incumbent carriers. Rural carriers are exempt from the obligations of subsection (c), but must still negotiate interconnection with other telecommunications carriers upon request under subsections (a) and (b), *if the Commission determines that the rural exemption does not apply.*

Order No. 2006-515, p. 8-9 (emphasis added). This conclusion is wrong as a matter of law.

4. The interconnection obligations of Section 251(a) apply to all telecommunications carriers, including rural carriers. Accordingly, the Defendants are obligated to comply with the duty to interconnect imposed by Section 251(a) of the Federal Act. Similarly, Section 251(b) of the Federal Act applies to all local exchange carriers, including rural incumbent local exchange carriers. Therefore, the Defendants are obligated under Section 251(b) to provide resale, number portability, dialing parity, access to rights of way, and arrangements for the transport and termination of traffic under Section 251(b) of the Federal Act. 47 U.S.C. § 251(a),(b)(2), & (b)(5). The FCC has determined that telecommunications carriers may interconnect under Section 251(a) or Section 251(c)(2). *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 995 (1996) (“*Local Competition Order*”). See also 47 CFR § 51.100.

5. Section 251(f) provides for an exemption from the duties imposed by subsection (c) for rural telephone companies under subsection (f)(1) or a suspension/modification of the duties imposed by subsections (b) or (c) under subsection (f)(2). Section 251(f)(1) of the Act creates a limited exemption from the affirmative duties in Section 251(c); it does not suggest that service providers that can compete *without* requesting services or facilities under Section 251(c) can be prohibited from doing so. The Federal Communications Commission has recognized that “[i]n choosing less competitively restrictive means of protecting rural and small LECs...Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition.” *AVR, L.P., dba Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Ann. § 65-4-201(D) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in*

Tennessee Rural LEC Service Areas, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064, 11073, ¶ 18 n. 50 (1999).

6. The rural exemption of Section 251(f)(1) specifically provides that Section 251(c) “shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines...that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title.” Although the Defendants motions to dismiss asserted that they are exempt from the interconnection duties found in Section 251(c) by virtue of their rural exemption found in Section 251(f), the Defendants failed to address this argument during the hearing held on their motion to dismiss TWCIS’ complaints.

6. Section 251(f)(2) provides for a suspension or modification of duties imposed under subsection (b) or (c). If a rural telephone company has fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide the rural carrier may petition the Commission for a suspension or modification of the application of Sections 251(b) or (c). 47 U.S.C. § 251(f)(2). It is important to note that Congress did not permit the rural telephone company to seek an exemption under Section 251(f)(2), but only a suspension or modification clearly indicating a desire for any such suspension or modification to be limited. None of the Defendants has sought or received a suspension or modification of the requirements contained in Section 251(b) of the Federal Act.

7. As a matter of law, the Defendants are not exempt from the obligations of Section 251(a) regardless of their rural status; and in this case, are not exempt from the requirements of Section 251(b) since they have failed to petition for a suspension or modification. Therefore, the Order’s statement that rural carriers are exempt from the obligations of Sections 251(a) and (b) is in error of law.

**THE ORDER ERRONEOUSLY HOLDS THAT THERE
IS A DISPUTED ISSUE OF FACT AS TO WHETHER TWCIS
IS A TELECOMMUNICATIONS CARRIER**

8. The Commission's ruling that the statutory classification of TWCIS' services under the Telecommunications Act is a disputed issue of fact is clearly erroneous in view of the evidence on record and is arbitrary and capricious or characterized by an abuse of discretion.

9. As counsel for ORS noted during the oral arguments on these motions "[t]he issue that appears to be most in contention is whether or not in this instance or in these geographic areas Time Warner is a telecommunications provider offering telecommunications service under this provision (Section 251) of the Act." Tr. 24, 116-18. This statement illustrates the basic error underlying the ruling in this case—there is no issue of fact. TWCIS is offering the same IP based voice services using the same technology it was using when the Commission first ruled that TWCIS was a "telecommunications carrier" and granted TWCIS a certificate of public convenience and necessity "to provide competitive, facilities-based intrastate local and interexchange *telecommunications services*" in Order No. 2005-412, p. 6, ¶ 1, p. 17, ¶ 1.¹

10. The Commission authorized TWCIS to expand its service area to include ALLTEL's service territory based on the same service offerings in Order No. 2005-385, on July 20, 2005. In the ALLTEL Order, the Commission confirmed that TWCIS was authorized to offer interexchange services and *local telecommunications services* noting that TWCIS currently provides facilities-based IP voice service to customers and intends to begin offering services in

¹ Moreover, any argument that TWCIS' position on this matter should lead the Commission to a different conclusion is erroneous. TWCIS has made clear that wishes to be treated as a telecommunications carrier in its provision of its IP-based voice services, is in compliance with Commission rules relating to telecommunications services, and has made it clear that it is a telecommunications carrier with respect to its activities in South Carolina.

the ALLTEL service area once it obtains an interconnection agreement. *Order No. 2005-385*, p. 2, 4.

11. The Commission has also approved interconnection agreements between TWCIS and Hargray Telephone Co., Inc.; Horry Telephone Cooperative; and BellSouth Telecommunications, Inc. pursuant to 47 U.S.C.A. Sections 251 and 252. TWCIS will be providing the same facilities-based IP voice service to customers in these service areas that it proposed providing in the service areas of the Defendants.

12. The fact that rural carriers seek to delay competition by refusing to interconnect does not change the nature of the services offered by TWCIS. If the service is a “telecommunications service” in BellSouth, Hargray, Horry Telephone Cooperative, and Alltel territories, how can the same service not be a “telecommunications service” in the service areas of the Defendants. The underlying facts do not change based on whether a party opposes a petition. The Commission made the finding of fact in the initial certification order that “TWCIS is a provider of local exchange and interexchange *telecommunications services*....” *Order No. 2004-213*, p. 9, ¶ 1. TWCIS has been treated as a provider of telecommunications services since the initial certification by the Commission and by other telecommunications carriers operating in South Carolina who are not trying to delay competition. Under South Carolina and federal law, TWCIS is operating as a telecommunications carrier.

13. TWCIS acknowledges the current state of the *law* regarding how VoIP telephony should be classified is currently being addressed at the Federal Communications Commission. It is a matter of public record that on December 14, 2005, due to the unsettled nature of the issues surrounding the appropriate regulatory treatment of VoIP services, counsel for TWCIS provided written confirmation to the Commission that TWCIS is still operating under the retail portion of its S.C. Tariff No. 1. The notice also confirmed that TWCIS intends to continue to offer its

Digital Phone service in South Carolina on a regulated basis through its current tariff. The facts in the case have not changed. The Commission has already found in two separate certification proceedings that the services offered by TWCIS are “telecommunications services.” There is always the possibility that the law’s classification of a type of service may change. The Commission is required to apply the law as it currently stands.

**THE ORDER MISCHARACTERIZES
THE RECORD IN REGARD TO THE
STIPULATION BETWEEN TWICS AND THE SCTC**

14. Order No. 2006-515 is clearly erroneous in view of the mischaracterization of the record in regard to the stipulation between TWCIS and the South Carolina Telephone Coalition (“SCTC”) in Docket No. 2003-362. The Defendants in this case participated in Docket No. 2003-362 as members of the SCTC². Order No. 2006-515 states that

Time Warner originally sought a Certificate of Public Convenience and Necessity to provide facilities-based competitive local exchange service via Voice over IP (VoIP) in December of 2003. During that proceeding the South Carolina Telephone Coalition (SCTC) intervened on behalf of a number of rural carriers (RLECs) and opposed the application on various grounds. Time Warner and the SCTC later reached an agreement whereby Time Warner stipulated that it would not offer its phone service in RLEC territories after July 1, 2004. In return, the SCTC withdrew its objections and this Commission granted Time Warner a limited certificate to offer phone service in all parts of the state except those where incumbent carriers still retained their rural exemptions.

In October of 2004, Time Warner petitioned to have the geographic restriction that it had previously agreed to lifted, allowing it to offer competitive local exchange service in all parts of the state, regardless of whether the incumbent local exchange carrier (“ILEC”) had a rural exemption. During that proceeding Time Warner argued that the FCC’s *Vonage Order* effectively

² According to the SCTC petition to intervene in Docket No. 2003-362-C, SCTC intervened in the docket on behalf of the following companies: Bluffton Telephone Co., Inc.; Chesnee Telephone Co.; Chester Telephone Co.; Farmers Telephone Cooperative, Inc.; Ft. Mill Telephone Co.; Hargray Telephone Co., Inc.; Home Telephone Co., Inc.; Horry Telephone Cooperative, Inc.; Lancaster Telephone Co.; Lockhart Telephone Co.; McClellanville Telephone Co.; Norway Telephone Co.; Palmetto Rural Telephone Cooperative, Inc.; Piedmont Rural Telephone Cooperative, Inc.; PBT Telecom, Inc.; Ridgeway Telephone Co.; Rock Hill Telephone Co.; Sandhill Telephone Co.; St. Stephen Telephone Co.; West Carolina Rural Telephone Cooperative, Inc.; and Williston Telephone Co.

preempted this Commission's authority to regulate its VoIP-based service, but than an expanded certificate was necessary for it to enter into interconnection agreements with the RLECs serving those areas that it previously stipulated not to serve.

Order No. 2006-515, p. 4-5.

15. The order misstates the record in several respects. First, the stipulation between TWCIS and the SCTC did not state that Time Warner *would not offer its phone service in RLEC territories after July 1, 2004*. The Stipulation was incorporated into Order No. 2004-213 and provided the following

TWCIS and SCTC agree that

TWCIS amends its application to seek to serve customers only in areas where the telephone company does not currently have a rural exemption under 47 U.S.C. § 251(f)(1).

As to rural telephone companies that no longer have a rural exemption under 47 U.S.C. § 251(f)(1), TWCIS will agree not to market or provision services in those areas before July 1, 2004.

Order No. 2004-213, p. 2-3.

16. The Order also misstates TWCIS' subsequent application in docket number 2004-208-C to expand its service area. TWCIS did not petition to have the geographic restriction that it had previously agreed to lifted, allowing it to offer CLEC services *in all parts of the state, regardless of whether the ILEC had a rural exemption*. Order No. 2006-515, p. 5. On October 1, 2004, TWCIS filed its application to amend its certificate to authorize TWCIS to serve customers only in the service areas of the Defendants in the present case, not in all parts of the state. See *Application of Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently have a Rural Exemption*, Docket No. 2004-280-C, filed October 1, 2004. On the same

day, TWCIS filed a similar application to expand its certificate to provide interexchange and voice services in the service areas of Alltel South Carolina, Inc. (“Alltel”). See Docket No. 2004-279-C. In both applications TWCIS requested authority to provide the same type of services as it was currently authorized to provide in other areas of South Carolina.

17. Finally, the Order mischaracterizes TWCIS’ position during the hearing held in Docket No. 2004-280-C. Order No. 2006-515 indicates that Time Warner argued that the FCC’s *Vonage* Order effectively preempted the Commission’s authority to regulate its VoIP-based service, but that an expanded certificate was necessary for it to enter into interconnection agreements with the RLECs serving those areas that it had previously stipulated not to serve. Once the FCC issued its order in the case of *Vonage Holdings Corp. Petition for Declaratory Ruling and Order of the Minnesota Public Utilities Commission* (“*Vonage Order*”), TWCIS notified the South Carolina Commission of the FCC decision. FCC Memo Opinion and Order Released November 12, 2004, 19 FCC Rcd. 22404, FCC 04-267. However, Order No. 2006-515 fails to note that TWCIS also informed the Commission that it intend to provide other regulated telecommunications services—not covered by the *Vonage Order*—pursuant to the certificate and its tariff. Hearing Transcript, Docket No. 2004-280-C, at 70-74, 129.

18. TWCIS submits that its substantial rights have been prejudiced because the findings, inferences and conclusions of Order No. 2006-515 are based upon mischaracterizations of the Commission’s record related to TWCIS’ earlier certification proceedings.

TWCIS requests that the Commission issue an order

- A. Reversing its decision to deny TWCIS’ motion for summary disposition;
- B. Correcting the errors of law and factual mischaracterizations of Order Number 2006-515; and

C. Granting such other relief as is just and proper.

Dated this 2ND day of October, 2006.

Robinson, McFadden & Moore, P.C.

/s Frank R. Ellerbe, III

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BEFORE

**THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

Docket Nos.

2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C

In re: Docket No. 2005-402-C)
)
Time Warner Cable Information Services)
(South Carolina), LLC,)
)
Complainant/ Petitioner,)
vs.)
)
St. Stephen Telephone Company,)
)
Defendant/Respondent)
)

CERTIFICATE OF SERVICE

In re: Docket No. 2005-403-C)
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Time Warner Cable Information Services)
(South Carolina), LLC,)
)
Complainant/ Petitioner,)
vs.)
)
Farmers Telephone Cooperative, Inc.,)
)
Defendant/Respondent)
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In re: Docket No. 2005-404-C)
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Time Warner Cable Information)
Services (South Carolina), LLC,)
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In re: Docket No. 2005-406-C)
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Services (South Carolina), LLC,)
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Complainant/ Petitioner,)
vs.)
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Ft. Mill Telephone Company,)
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Defendant/Respondent.)
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This is to certify that I, Bonnie D. Shealy, an attorney with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Time Warner Cable Information Services (South Carolina), LLC's Petition for Reconsideration of Order No. 2006-515** in the foregoing matter by email and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 2nd day of October, 2006

/s Bonnie D. Shealy

Bonnie D. Shealy